BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DEBRA A. WOODS	)	
Claimant	)	
V.	)	Docket Nos. 1,066,051
	)	& 1,066,052
GENERAL MOTORS, LLC	)	
Self-Insured Respondent	)	

ORDER

Claimant, through Zachary Kolich, requests review of Administrative Law Judge William Belden's November 23, 2015 preliminary hearing Order. Karl Wenger appeared for self-insured respondent.

The record on appeal is the same as that listed by the judge, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant has two separately docketed claims which were consolidated for purposes of the preliminary hearing. Docket No. 1,066,051 concerns a May 23, 2012 right knee injury when claimant's right foot got caught in a floor mat. Docket No. 1,066,052 involves a November 15, 2012 right knee injury after claimant's personal bag got caught in an employee turnstile.

The judge found claimant failed to prove either accident was the prevailing factor causing her injury, medical condition or need for medical treatment. Claimant requests the Order be reversed, arguing she proved her right knee meniscus injury arose out of and in the course of her employment and her work-related accidents were the prevailing factor in causing her injury, medical condition and need for medical treatment. Respondent maintains the Order should be affirmed. Respondent asserts both accidents were mere aggravations of claimant's preexisting knee condition and claimant failed to prove the prevailing factor requirement.

The issue is: did claimant meet with personal injuries by accident arising out of and in the course of her employment, including whether her asserted accidents were the prevailing factor causing her injury, medical condition and need for medical treatment?

FINDINGS OF FACT

Claimant, 62 years old, has worked for respondent for 34 years, most recently doing inspections on an assembly line. Prior to the asserted injuries in these matters, claimant injured her right knee while working for respondent in November 2006. A right knee MRI in June 2007 showed an oblique/flap tear of the posterior horn of her medial meniscus with abnormal signal extending to the inferior articular surface and a small Baker's cyst without significant chondromalacia. Craig C. Newland, M.D., performed a right meniscectomy on claimant in September 2007. She was released to full duty in October 2007. The judge determined, and the parties agreed, that claimant last saw Dr. Newland in January 2008. At that time, claimant reported some aching and a catching sensation at times, but being pleased with the lasting resolution of her predominant symptomatology. Physical examination showed normal gait, stated tenderness, no effusion and full range of motion.

In April 2008, claimant settled her 2006 accidental injury on a full and final basis. Claimant testified she was "pain free" and had no further problems after her settlement.[1] Claimant testified that until May 2012, she received no treatment and had no ongoing pain or problems with her right knee. Claimant did, however, testify Dr. Newland told her she would eventually need a right total knee replacement.

In order to perform inspections, claimant walked on rows of interlocking rubber mats about two to three inches thick. Claimant testified that on May 23, 2012, her right foot caught the edge of a loose rubber mat. She tripped, but caught herself and did not fall. She felt tingling in her right knee. Claimant reported the accident. She was sent to plant medical the next day. The plant medical note indicated, "This midnight employee states this is a repetitive, ergonomic, work-related injury." A plant nurse assessed claimant as having alteration in comfort and gave claimant ice, pain medication and a brace. She continued to work full duty. Claimant testified her pain and symptoms were similar to what she experienced with her right knee in 2006 or 2007.

Jesse Cheng, M.D., with plant medical, completed a June 4, 2012 report stating, "Employee reports just walking back and forth in workplace foot print as causing her knee pain and uneven mats. This is not an ergonomic issue but possibly a [s]afety issue regarding the mats." At some point, respondent denied compensability of the May 23, 2012 accident and claimant was provided no additional medical treatment apart from ibuprofen and ice.

Claimant returned to plant medical on November 13, 2012, and requested ice for a "reaggravation of her . . . 'meniscus tear'" and symptoms "exactly the same as her previous injury."

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[1] P.H. Trans. at 28.

Claimant testified that on November 15, 2012, she was going through an employee turnstile to enter respondent's plant when her personal bag got caught on one of the bars. She felt a pull and twist and a sharp pain in her right knee. Claimant reported the accident and was seen by plant medical that day. Claimant had no edema, but walked slowly with a slight limp and reported her pain was an 8 on a 1-10 scale with 10 being the worst pain. Claimant was given ice, ibuprofen and an elastic bandage. She continued to work full duty and received no further medical treatment other than ice and ibuprofen. She testified her pain and problems were in the same area of the knee as the May incident, but worse.

Claimant went back to plant medical on November 20, 2012. She had moderate effusion of her right knee. Frederick A. Buck, D.O., assessed claimant with right saphaneous nerve neuritis and right medial hamstring tendonitis. At some point, respondent denied compensability of claimant's November 15, 2012 accident.

Claimant returned to Dr. Cheng at plant medical on April 19, 2013. Dr. Cheng's note indicated claimant said she hurt where she previously had surgery, she reported walking caused her knee pain, she denied an acute injury and said her pain progressed over time. Claimant returned to Dr. Cheng a week later, and reported tripping a few times on a mat, which Dr. Cheng stated was a change in her story from the prior week.[2] Dr. Cheng ordered a knee x-ray, which showed arthritic changes/degenerative joint disease (DJD). Dr. Cheng opined claimant's work was not the prevailing factor causing her knee pain.

At claimant's attorney's request, Edward J. Prostic, M.D., evaluated her on September 6, 2013. Claimant complained of frequent pain, which increased with progressive standing or walking. She reported difficulty with stairs, squatting and kneeling, in addition to episodes of locking and giving way. Dr. Prostic indicated claimant's presentation was highly suggestive of recurrent tearing of the medial meniscus. He recommended an MRI of claimant's right knee. Assuming claimant had a tear, Dr. Prostic suggested arthroscopic debridement. The doctor stated, "The two twisting injuries during the course of her employment May 23, 2012 and November 15, 2012 are the prevailing factor in the injury, the medical condition, and the need for medical treatment."[3]

At respondent's attorney's request, Chris D. Fevurly, M.D., evaluated claimant on October 15, 2013. Claimant complained of constant pain along the entire medial knee into the calf, which was aggravated by prolonged standing and walking. She reported occasional locking and a feeling of her knee giving way. Dr. Fevurly noted claimant had a normal gait. The doctor diagnosed her with moderate degenerative arthritis in the right medial and patellofemoral compartments with collapse of such joint spaces. Dr. Fevurly stated it was possible claimant had a recurrent tear of her right medial meniscus.

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[2] Claimant testified she consistently told respondent she was injured tripping on a mat.

[3] P.H. Trans., Cl. Ex. 1 at 2.

In addressing causation, Dr. Fevurly stated:

> The mechanism of injury (repetitive ergonomic work-related walking injury on the assembly line footprint) which she originally told GM Medical Department on the first visit on 5/24/12 for the right knee pain would not be the prevailing factor in producing an acute medial meniscal tear. This mechanism could aggravate preexisting DJD in the right knee.
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> The second mechanism of injury to the right knee (twisting events resulting from tripping on the mats or when she was stopped suddenly by her bag caught up in the entry turnstiles on 11/15/12) would be the prevailing factor for an acute medial meniscal tear; however a MRI of the right knee has not been completed to determine if there is an acute medial meniscus tear. Without a MRI or arthroscopy, I cannot rule out a new or acute medial meniscus tear; however, the current evaluation is most consistent with pin from the advanced DJD present in the right knee.
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> The DJD in the right knee appears to be related to her age and to the earlier right knee surgery 6 years ago. . . . It would appear likely that there was DJD or chondromalacia or extensive injury to the medial meniscus in 2007 based on her deposition report that Dr. Newland (in 2007-2008) felt that she may eventually need replacement surgery. This leads me to feel that her current complaints are primarily related to the preexisting advanced nature of her DJD in the right knee as opposed to acute injury to the meniscus from either the May 2012 or November 2012 events.[4]

Dr. Fevurly gave claimant no permanent work restrictions, but recommended limited kneeling, squatting and crawling due to claimant's advanced right knee DJD. An MRI of her right knee and possible injections were recommended.

In an October 24, 2013 Order, the judge directed respondent to authorize an MRI of claimant's right knee and an independent medical evaluation for claimant at the Dickson-Diveley Midwest Orthopaedic Clinic with the first available orthopedist, who turned out to be Steven T. Joyce, M.D.

The MRI, performed on November 13, 2013, was interpreted by John Pope, M.D., as showing a horizontal-oblique longitudinal tear to the inferior articular surface in the body of the medial meniscus, with two to three millimeters of meniscal extrusion of the medial meniscal body, evidence of claimant's prior medial meniscectomy based on the posterior horn and body of the medial meniscus being small, moderate cartilage thinning, surface irregularity and marginal osteophyte formation in the medial compartment and mild cartilage thinning in the patellofemoral and lateral compartments.

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[4] *Id*., Resp. Ex. A at 12.

Dr. Joyce evaluated claimant on November 18, 2013. Claimant complained of medial joint line pain and she walked with a minimal antalgic gait. Dr. Joyce noted plant medical, following claimant's May 23, 2012 accident, performed x-rays and assessed claimant as having DJD of the medial compartment of her right knee.[5] The doctor further noted claimant twisted her right knee on November 15, 2012.

Dr. Joyce reviewed the November 13, 2013 MRI and noted many of the same findings as had the radiologist, including that the posterior horn and body of the medial meniscus were reduced in size consistent with prior surgery, the horizontal oblique tear in the inferior articular surface of the meniscus, osteophytes and cartilage thinning. Dr. Joyce assessed claimant with significant degenerative arthritis in her right medial knee compartment and noted the MRI showed a horizontal oblique tear in the inferior body of the medial meniscus. In answering the parties' specific question regarding claimant's diagnosis, Dr. Joyce stated "[r]ight knee degenerative arthritis, medial compartment" and further noted claimant's 2007 knee surgery likely contributed to her right knee medial compartment degenerative arthritis.

Page two of Dr. Joyce's report stated, "The prevailing factor for the injuries on May 24, 2012 and November 15, 2012 in my opinion is aggravation of the pre-existing degenerative arthritis of the right knee."

Dr. Joyce did not recommend an arthroscopy for what he termed a recurrent medial meniscal tear because of likely increased cartilage wear on the medial side of claimant's knee joint. He found claimant to be at maximum medical improvement, but noted options included anti-inflammatory medication, cortisone and visco supplementation. Dr. Joyce provided no permanent work restrictions, but indicated limited kneeling, squatting, climbing and crawling should be considered. Dr. Joyce further indicated claimant had no increased permanent impairment because her degenerative arthritis predated the 2012 events.

Claimant currently has pain, swelling, locking and/or buckling sensations in her right knee. She continues working full duty, but wears a brace to keep the pain and swelling down. Claimant testified to her belief that tripping on the mat caused her symptoms and complaints. She testified her pain is similar to the pain she had in 2006-2007.

On page 3 and 4 of the November 23, 2015 Order, the judge stated:

> Claimant met her burden of proving the alleged accidental injury of May 23, 2012 was the product of a work-related risk. Claimant testified she tripped on a mat at her workplace, and this testimony was not contradicted. Claimant did not encounter

[5] Respondent's plant medical did not make this diagnosis or conduct x-rays until April 2013.

these mats outside her working life. The failure of the mats to connect placed Claimant at an increased risk of injury from tripping compared to Claimant's non-working life. In like token, Claimant met her burden of proving the alleged accident[al] injury of November 15, 2012 occurred while Claimant was acting in the course of her employment and was the product of a work-related risk. Although Claimant may not have been getting paid while navigating the turnstyle, she was taking the most direct route Respondent directed Claimant to take to commence her work for Respondent. Claimant did not encounter turnstyles like the employee-only turnstyle outside her working life. When Claimant was walking through the turnstyle, she was exposed to a greater risk of injury from the turnstyle on account of her working conditions. Claimant met her burden of proving she was placed at a greater work-related risk of injury and was acting in the course of her employment on May 23, 2012 and November 15, 2012. Claimant, however, must still prove the events of May 23, 2012 or November 15, 2012 were the prevailing factor causing the injury, medical condition and need for treatment.

Having considered the record as a whole, the Court concludes Claimant did not sustain her burden of proving the events of May 23, 2012 or November 15, 2012 were the prevailing factor causing the alleged injury, medical condition and need for treatment. Dr. Prostic thought the events were the prevailing factor causing a possible medial meniscus tear, but he was not certain of the diagnosis. Dr. Fevurly did not believe either event was the prevailing factor causing Claimant's current symptoms, but was not certain whether Claimant sustained a medial meniscus tear, either. Following an MRI scan, Dr. Joyce evaluated Claimant and thought the events of May 23, 2012 and November 15, 2012 aggravated Claimant's preexisting degenerative condition. The Court finds the opinions of Dr. Joyce the most credible because they are based on review of an MRI scan and a better understanding of the structure of Claimant's knee, and because Dr. Joyce is the Court-appointed examining physician. An accidental injury is not compensable if it is an aggravation of a preexisting condition. Therefore, Claimant did not sustain her burden of proving the events of May 23, 2012 or November 15, 2012 were the prevailing factor causing the alleged injuries, medical condition or need for treatment. Accordingly, the requests for medical treatment and unauthorized medical must be denied.

In conclusion, Claimant proved the event of May 23, 2012 was the product of a work-related increased risk of injury, and the event of November 15, 2012 was the product of a work-related increased risk of injury falling within the course of employment. Claimant, however, failed to prove either the event of May 23, 2012 or November 15, 2012 was the prevailing factor causing the alleged injury, medical condition or need for medical treatment. Therefore, the requests for medical treatment and unauthorized medical are denied. The costs of these proceedings, including the Court reporter's charges, shall be paid by Self-Insured Respondent.

Claimant appealed.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(b)[6] states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2011 Supp. 44-501b(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

[6] There is no distinction between the 2011 and 2012 versions of the quoted statutes.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

Claimant had an aggravation of her preexisting knee condition, but the analysis does not end there. K.S.A. 2011 Supp. 44-508(f)(2) does not bar compensability for *any* aggravation of a preexisting condition. Under such statute, we must address whether claimant "solely" aggravated her preexisting condition. The statute says, "An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic." The Legislature intended the word "solely" to mean something. The Kansas Workers Compensation Act does not define the term, but "solely" is judicially defined as "singly" or "[e]xclusively."[7] Therefore, if claimant has an injury above and beyond a sole aggravation of her preexisting condition, for instance, a new physical injury, the statute does not bar compensability. Cases touting this focus are noted in *Le*.[8]

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[7] *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 2010 WL 1462763 (Kansas Court of Appeals unpublished opinion dated Apr. 8, 2010).

[8] *Le v. Armour Eckrich Meats*, ___ Kan. App. 2d ___, ___ P.3d ___, 2015 WL 8622545 (2015).

The evidence suggests claimant currently has a new, different and worse meniscal injury and not "solely" an aggravation of her preexisting condition. Additional medical evidence may be of assistance, but claimant's current horizontal-oblique longitudinal tear to the inferior articular surface in the body of the medial meniscus and extrusion of her meniscus is different than the preexisting oblique/flap tear of her posterior horn.

Claimant's physical injury, lesion or change could possibly be occasioned by the progression of her preexisting condition. However, Dr. Prostic indicated claimant's two 2012 accidents were the prevailing factor in her injury, which he indicated was "highly suggestive" of a recurrent tearing of her medial meniscus. Dr. Prostic need not be *certain* of claimant's diagnosis, insofar as the applicable burden of proof is based on probability. "Highly suggestive," in this context, is greater than a 50% probability. Additionally, Dr. Prostic's diagnosis turned out to be correct.

Dr. Fevurly indicated claimant's November 2012 accident would be the prevailing factor for her injury if she had an acute meniscal tear, but he could not rule a meniscal tear in or out without an MRI. Going hand-in-hand with Dr. Prostic's opinion, it turned out claimant did in fact have a meniscal tear. This Board Member further finds claimant's meniscal tear was acute, at least based on the current evidence.

Dr. Joyce's opinions regarding diagnosis and prevailing factor are not entirely helpful because such opinions omit or downplay claimant's recurrent meniscal tear. Rather, his focus was on the fact that claimant had a preexisting degenerative knee and still has such condition. To this Board Member, the focus should be on: (1) whether there is more than solely an aggravation of a preexisting condition, *i.e.*, is the recurrent meniscus tear in addition to an aggravation of DJD, and (2) if so, did the accident cause the injury, medical condition, and resulting disability or impairment? Dr. Joyce was not asked if claimant's injuries solely aggravated, accelerated or exacerbated her preexisting condition.

This Board Member, based on the current facts and evidence, places greater weight on the opinions of Drs. Prostic and Fevurly. Both doctors opined either both or one of claimant's 2012 accidents caused her current meniscal tear, if noted on an MRI. The MRI confirmed claimant had a new meniscus tear. While I would like to place more weight in the neutral opinion of Dr. Joyce, he focuses too heavily on an aggravation of claimant's arthritis, while not commenting whether something other than what might be "solely" an aggravation occurred or directly addressing whether a change in the physical structure of claimant's body occurred.

Given what appear to be increased physical findings and symptoms after the November 15, 2012 event, in addition to carefully considering the medical evidence, this Board Member concludes such accident was the prevailing factor in claimant's injury and need for treatment.

CONCLUSIONS

While subject to change based on additional evidence, this Board Member concludes claimant proved her right knee meniscal tear is compensable because it is not solely an aggravation of her preexisting condition and the prevailing factor in her injury and need for treatment is her November 15, 2012 accident.

WHEREFORE, the undersigned Board member reverses the November 23, 2015 preliminary hearing Order and remands for consideration of claimant's requests.[9]

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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[9] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.